No. 15991

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HARSH CALIFORNIA CORPORATION, a California corporation,

*Appellant,*

*vs.*

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

*Appellees.*

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**On Appeal From the Judgment of the United States District Court for the Southern District of California.**

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## APPELLANT'S REPLY BRIEF.

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## APPELLANT'S REPLY BRIEF.

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Before making direct answer to contentions raised by appellees, a preliminary statement seems necessary to clarify actual issues before this Court.

### Introductory Statement.

Contrary to the position taken by them in the court below, and to the findings of the Trial Judge based thereon, appellees now suggest that there is no basic Federal jurisdiction in the District Court in this matter under 28 U. S. C. 1331, because it does not involve a "controversy" arising "under the laws of the United States" (Appellees' Br. pp. 5-6).

On the same page, and immediately following the above, appellees inconsistently state:

> "We admit freely that in the collection of this tax a law of the United States will be invoked by the taxpayer."

Before the District Court, both appellant and appellees recognized that the actual "controversy" arose here out of a Congressional offset or "credit", provided by Section 408 of the National Housing Act, as amended in 1956 by Public Law 1020.

The particular Congressional purpose in amending Section 408 in 1956 is obvious. Local property taxes are, of course, levies imposed in return for governmental services rendered by a local taxing agency. Under the National Housing Act, and the Wherry Act leases adopted pursuant thereto, *most,* if not all, of these local governmental services were furnished in two ways:

1. *The lessee itself provided for installation and maintenance of streets, street lighting, sewers, rubbish and garbage disposal; police, fire protection, library and recreational facilities were furnished by the military service itself.*

2. *The remaining area of local governmental service was provision of schools and maintenance of schools for the children of military personnel.*

This, by separate statute, was paid to the local entity *directly* by the Federal Government as a *subsidy.*

*If* local government levied taxes on the lessee's interest in the military housing project, when Governmental services were furnished almost wholly at Federal expense or by *cash* subsidies from Congressional appropriations, there would be a *windfall* to local governments involved. Since payment of the local taxes would *increase* rents charged, the *basic* Congressional purpose would be hampered.

Section 408 was amended to provide an offset or "credit" against local taxes levied on the project when the value of the services rendered by the lessee or by the Federal Government had been determined.

In this case, the designee, Captain Hunter, limited his determination to the *direct cash subsidies only.*

Unfortunately, in Section 408, Congress did *not* provide a basis for its *administrative* enforcement. It apparently relied upon fairness of County officials, when the determination was itself made, to work out a means for its allowance. *The present situation was created by refusal of San Bernardino County to honor such determination.*

Appellant was thereupon compelled to take legal steps to fulfill its obligations to the United States.

It is apparent *there is no express statutory means of enforcement of the offset or "credit."* Under California law, Appellee Tax Collector is under a duty to require payment of local taxes, either in legal tender of the United States or in exceptional circumstances, by county warrants (Appellant's Op. Br. p. 14). Obviously, Section 408 does *not* fall within *either* category.

While the Board of Supervisors might, upon notice, by cancellation of the tax, have removed the duty of its collection from the Tax Collector, the San Bernardino Board of Supervisors, and its Counsel, saw fit *not* to do so. Appellees concede (Appellees' Br. p. 16) that if formal petition for cancellation had been made by Appellant, and refused, there would have been no statutory means available to it to compel such action.

Common law remedies of counterclaim, based upon such a credit or offset, are, under California law (as expressly held by this Court in *Sunset Oil Co. v. State*

*of California,* 87 F. 2d 972) barred unless there is an express consent to sue the State. No such consent has been claimed to exist; and none does.

Appellant's *only* means of complying with its duty imposed, by its landlord, the United States, was to apply to the District Court below for declaratory judgment as to the meaning of Section 408. If its rights, declared by such judgment, were then not recognized by the county officials, its enforcement could only be compelled by suitable injunctive relief in the court below.

It was therefore for declaration of an *independent* Federal right, arising out of the ". . . laws of the United States", that jurisdiction here initially vested in the court below.

That an "actual controversy", as to the meaning and effect of such Federal statute here exists is self-evident from a reading of Appellees' brief. The remedy sought of declaratory judgment was clearly authorized by 28 U. S. C. 2201.

It is evident that 28 U. S. C. 1341 (Johnson Act) has no relevancy to this proceeding. There is no attempt here to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax; but, rather, to establish and enforce, as a separate, distinct countervailing right thereto, the Congressionally declared offset or credit.

Significantly, in the court below, and in their present brief, Appellees do not point out any "plain" or "speedy", or "efficient remedy" so to do. The very most that can be said of their claims is that there is *some* possibility that statutory judicial proceedings *might* suffice. But the Supreme Court has long held that if there is *any* uncertainty as to the "adequacy of the remedy", the Federal Court *should not refuse,* by mistaken rule of comity, to exercise its statutory jurisdiction. Rather, it should ter-

minate the controversy and enforce the Federal rights involved. *Hillsborough Township v. Cromwell,* 326 U. S. 620 (1946) (discussed App. Op. Br. pp. 31-33).

Confusion of Appellees as to true issues before this Court seems to have arisen from two facts:

1. *Inability* to *distinguish between* a factual situation where, as here, a *Federal "credit" or offset* is to be enforced which relieves the holder of such "credit" from liability to pay an otherwise valid tax, and *contrary,* but *usual* situations, where *collection* of a tax *is sought to be prevented because of defect* (Federal in character), *inherent to the State tax proceeding;*

2. Failure to realize that since California has not provided, administratively or judicially in recent years for any State offset or "credit" which could be taken against a valid property tax, for obvious reasons the State statutory tax corrective procedure is lacking in any provision directly applicable here.

**Summary of Answers to Appellees' Misconceptions.**

Appellees' argument, to which we now turn, rests upon *three separate* although related, *misconceptions* namely:

(1) Appellees conceive Appellant's contention as being an attack upon the validity, at least at the collection stage, of a State tax.

*Answer:* We admit the right to collect the tax, but assert a "credit," under paramount Federal statute, against the same.

(2) Appellees *assume* Appellant is setting up a "defense," based upon Federal statute, to a State tax, for the purpose of enjoining its collection.

*Answer:* We actually seek to establish, by *independent* Federal statute, a "credit" or offset to an admitted

tax liability, that would, when recognized, excuse payment of any amount of taxes by this Appellant.

(3) Appellees, *assuming* that this is an action basically to enjoin, suspend, or restrain collection of a state tax, argue that, by reason of adequacy of state remedy, jurisdiction of the District Court was barred by 28 U. S. C. 1341 (Johnson Act).

*Answer:* This proceeding does *not* fall within the purview of Section 1341. At most, such section may be referred to as a statement of policy only, but not necessarily controlling upon the District Court in exercising jurisdiction. Since Appellees cannot, and do not, assert any "plain, speedy or efficient" remedy open to Appellant, there is no justification here for the trial Court to refrain from exercising its clear jurisdiction.

## I.

### This Suit Is Not an Attack on State Tax; It Is One to Establish a Federally Created Offset or Credit to a Valid State Tax.

By concession of both parties on this appeal, this Court has only one basic question submitted to it: Did the District Court have jurisdiction to entertain Appellant's suit?

Thus, Appellant concedes the entire validity of the County tax on its "possessory interest", under both state and Federal Constitutions and statute (App. Br. p. 10).

Appellees concede "for the sake of this argument only," that the Congressional Amendment in 1956 to Section 408 of the National Housing Act by Public Law 1020, creating a "credit" or "offset" is "valid".

This follows because Appellees expressly concede, for such limited purpose, that the determination constitutes

a valid defense[1] to "any" liability Appellant would otherwise have for payment to the County of "any" tax.

Although the entire validity of Appellant's "credit" or offset to the claimed tax is conceded by Appellees, they, nevertheless, erroneously assume that this suit is, itself, an attack on a state tax proceeding.

Suffice it to quote the California Supreme Court in *Himmelman v. Spanagel,* 39 Cal. 389, 393, when it stated:

> "The origin, obligatory force and whole nature of a tax is such that it is impossible to conceive of a demand that might be set off against it, unless expressly so authorized by statute." (Our italics.)

Although Appellees concede on this appeal the "validity" of the Federal credit in all respects, they, nevertheless, have refused to give effect thereto. It thus would be most difficult to find a clearer case of "actual controversy within its jurisdiction" of a Federal District Court. By reason thereof, it would seem clear that in this case, it had obvious jurisdiction under Title 28 U. S. C. 2201,

## II.

**Appellees Misconceive Appellant's Federal "Credit", or Offset, to Be Only a "Defense" to a State Tax; Actually, the Credit Arises From an Independent Source, Which, if Pleaded, Requires Under California Practice Separate Counterclaim or Cross-Complaint.**

Appellees' *second* misconception follows from their first. Still *assuming* that this is an *attack* upon *collection* of a state tax, they argue that Appellant's "credit" or offset is only a "defense". At pages 4-12 of their brief, they further assert that a "defense", even though based on a Federal statute, does not bring this case within

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[1]As discussed under Point 2, the use by Appellees of the word "defense" discloses a second misconception by them.

primary jurisdiction of the District Court under 28 U. S. C. 1331. This was not, of course, Appellees' position in the court below.[2]

Appellees seem to concede that if the "matter in controversy" be the Federal statutory "credit" or offset, then their contention as to a lack of primary Federal jurisdiction is unsound.

We have previously pointed out (*supra,* p. 6) the factual concessions made by *both* parties in this case, *i. e.,* that the state tax and Captain Hunter's determination of the Federal "credit" thereto, are *both valid.* Yet San Bernardino County refuses to honor the latter. *Just what is the controversy, unless it be such credit?*

Appellees' contention (based on the assumption that the "credit" or offset is only a "defense") is further *procedurally* unsound in view of California procedure requirements.

In Witkin, *California Procedure* (1954), Vol. 2, at page 1570, the writer states:

> "A cross-complaint is a separate pleading, and a counterclaim, though part of the answer, is separately stated. *Either is based upon an independent cause of action, prays for the relief sought, and must be set forth with the same completeness and sufficiency of allegations as a complaint on such a cause of action.* (See *Asamen v. Thompson* (1942), 55 C. A. 2d 661, 674, 131 P. 2d 841 [cross-complaint]; *People v. Buellton Dev. Co.* (1943), 58 C. A. 2d 178, 184, 136 P. 2d 793 [*cross-complaint does not*

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[2]Although the trial judge at the first hearing below suggested that the basic Federal jurisdiction be briefed for him on the second hearing, appellees' counsel at the second hearing stated:

> ". . . I am not, myself, convinced that this case does not sufficiently involve federal law to fit that clause of Section 1331, although it could be viewed, and we have these cases to indicate it, that the State tax is the primary cause and the substance of the action. But I do not wish to lean on that point, and that is the reason we did not argue it in the first place." [Rep. Tr. p. 33.] This is consistent with Appellees' statement (p. 4).

*lie against state if based on cause as to which state has not consented to be sued*]; Clark, p. 639; 10 So. Cal. L. Rev. 433.)" (Our italics.)

Distinguishing such matter from purely *defensive* material, the writer continues:

"Essentially an affirmative defense *attacks the plaintiff's claim* by setting up such matters as fraud, estoppel, excuse for nonperformance, accord and satisfaction, etc. A counterclaim or cross-complaint does not attack the plaintiff's claim but asserts an independent cause of action of the defendant to *defeat the plaintiff's ultimate recovery by an offset,* or to *obtain an affirmative judgment for the excess . . .*"

Thus, contrary to Appellees' contentions, Appellant could *not* defend on the provisions of Section 408 of the National Housing Act against the state tax asserted by the County—*unless it set up its "credit" or offset by appropriate counterclaim.*

This is actually sufficient answer to argument and citations made by Appellees, at pages 4-10 of their brief. A brief survey, however, of certain of the citations relied upon may be of aid to this court.

First, it has never been Appellant's contention that the primary jurisdiction of the District Court is broadened or extended simply by use of one of the remedies permitted to said court. The matter contained at page 5 of Appellees' brief is not concerned with any argument or issue in this case.

The same is true of citations appearing on pages 7 and 8. As we have already pointed out, the "credit" or offset arises solely by Federal law, is *not* defensive in character, and is matter which must be *separately* pleaded.

Again, the cases cited at pages 11-12, for the proposition that a "Federal-law defense does not create Fed-

eral jurisdiction" (regardless of how sound they are generally) are not applicable to the situation here involved.

Two cases, however, may warrant a little more discussion. *Board of Supervisors v. Stanley,* 105 U. S. 305, concerned a state tax levy on national bank shares. The Federal statute permitting such taxation of a Federal instrumentality, then and now, consented to such tax only on the basis of *equal* treatment with *other* intangibles under state law.

State law required a deduction for debts owing by shareholders taxed on their intangible personal property. The taxpayer contended that a similar offset was not allowed by the state statute taxing the national bank shares. The Supreme Court simply held that if, on a showing that the state officials were not granting such required equal treatment to national bank shares, the state "assessment" would become "erroneous" and, on such ground, could be defended against in the state courts.

None of this is applicable to the facts here. All that Appellant claims is a federally created statutory "credit" against a valid State tax.

For the proposition that a Federal statute will not be construed to enlarge Federal jurisdiction, without a distinct manifestation of that Congressional intention, Appellees cite *Sanders v. Allen,* 58 F. S. 417, 420.

In that case, plaintiff sought Federal jurisdiction of a simple tort action, brought by a tenant against her landlord for "continued irritating conduct." Apparently this conduct had been motivated by a desire to force the tenant to leave the premises, and rid the landlord from the Emergency Price Control Act.

As Judge O'Connor pointed out, page 21, the facts of the complaint "if established, would make out an action

in tort . . . triable in the state courts *without any reference to the Federal statute referred to in the complaint.*"

The legal statement in Appellees' Brief (p. 9) refers only to a *dictum* in the case. Even if it were not, it would have nothing to do with issues before this Court.[3]

As to authorities previously cited by us, we are willing to submit Appellees' comments thereon (pp. 10-11) without further reply other than to refer this Court to comments previously made by us at pages 11-14 of Appellant's Brief.

Two obvious misunderstanding of true issues here presented, on the part of Appellees, however need additional notice. They comment on *Peyton v. Railway Express Co.*, 16 U. S. 350 (App. Op. Br. p. 12), as being under the predecessor section to 28 U. S. C. 1337, and that this section, unlike Section 1331, "lacks the 'matter in controversy' requirement."

Turning to 1331, we find that the full text is the limitation on Federal jurisdiction to those cases "where the *matter in controversy* exceeds the sum or value of $3000." The *source of jurisdiction* is found in the following phrase "arises under the Constitution, Laws or Treaties of the United States."

Again, Appellees properly concede that in *King County v. Seattle School Dist.*, 263 U. S. 361 (quoted App. Op.

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[3]So that this court will not believe that the short treatment given Appellees' authorities arises from lack of knowledge of their contents, or a desire to avoid specific discussion, we point out here additional inapplicability to the present issues.

Thus, in reference to the cases on page 8 of Appellees' Brief, beginning with *Republic Pictures v. Security First Nat'l Bank*, 197 Fed. 2d 767, and again, lower on the page, *Provident Savings v. Ford*, 114 U. S. 635, a reading thereof will disclose to the Court that all these decisions hold is that the Federal question must *arise out* of the *plaintiff's complaint* and as a *foundation* of *its cause of action*, and *not* simply *appear* therein *as anticipation of a defense* which would be raised thereto.

Br. p. 11), "plaintiff's primary right was Federal" to receive the moneys due it under the subsidy statute. Further comment that in this case "Harsh's primary right to his money is not based on an Act of Congress; it is simply Harsh's money, collected in the ordinary course of business," is a complete *non sequitur*.

Actually, as the plaintiff in the *King County Case* sought to enforce its right under Federal statute to subsidy money, so Appellant, in this case, seeks to enforce its right under the Federal statute, because of prior Federal subsidy payments, to subsidy "credit".

## III.

**This Suit Is Not One to Enjoin Collection of a State Tax, and Therefore Not Within Purview of Johnson Act; in Any Event, No Certain State Remedy Exists to Bar Federal Jurisdiction.**

Appellees' argument in this regard is in two sections of their brief. The substantive argument appears at pages 25-30. The balance appears at pages 12-25. We will take up Appellees' contentions in reverse order.

Appellees admit, at page 26, that the first question posed under 28 U. S. C. 1341 is whether the instant action is "one to enjoin, suspend or restrain the assessment, levy or collection of a California tax".

By reference to the caption of the complaint, Appellees contend that Appellant is inconsistent in urging in this court that the suit in question is one for declaratory judgment, and not one falling within the purview of injunctive proceedings conditionally barred by the Johnson Act. This statement is, of course, not true.[4]

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[4]The Reporter's Transcript shows that appellant's opening statement in the District Court, was as follows:

"Mr. Holbrook: There is no contention here made by the plaintiff that the San Bernardino County tax is invalid *per se*.

As earlier discussed (App. Op. Br. p. 31), the controlling decisions in this respect are *Hillsborough Township v. Cromwell,* 326 U. S. 620, and the earlier decision in *Great Lakes Co. v. Hoffman,* 319 U. S. 293,

Perhaps it is only a technical difference, but, as there pointed out by the Supreme Court, the Johnson Act is a *legislative* pronouncement of an equitable and *judicial* rule long followed before its enactment by the Federal Courts.

Summarized, therefore, the *correct* proposition is contrary to the finding of the trial court. This proceeding *is not and could not* be barred by 28 U. S. C. 1341 because said section is not applicable to its subject matter.

On the other hand, if there is a "plain", "speedy", *and* "efficient" remedy existing in the state courts, it would be eminently proper for the District Court to refrain from exercising its jurisdiction under Section 1331, and the use of the remedy of declaratory judgment under 28 U. S. C. 2201.

This brings us to the second branch of the controlling *Hillsborough Case.* It is not enough to suggest that a remedy does lie, even if a court of the state has so held,

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In other words, other than for the 1956 amendment, there is no question, so far as this proceeding is concerned—there may be a defect that we are not raising at this time—that the obligation represented by the tax bill, attached to the complaint is due and payable.

"Now, for certain reasons to prevent unjust enrichment, Congress has provided an offset to that. Now, there is no provision in California law for an offset without an express statute so to do. There is no express statute in California so doing, for administrative purposes or for court action. The normal remedies of injunction, mandate and prohibition—not prohibition—certiorari, being agreed between the parties not to be available, it is our contention that to enforce this new right created by the 1956 Congressional Act, it is necessary to come to this court, because there is no remedy in the state courts of any kind at all. Now, that's my statement in a nutshell, Your Honor." [Rep. Tr. pp. 14-15.]

if there seems to be conflict of that decision with other state decisions.[5]

As was concluded therein, when there is "such uncertainty surrounding the adequacy of state remedy" this will "justify the District Court in retaining jurisdiction of the case"—even when, in that case, the District Court was able to decide the question solely on state law.

In this case, mere *assumption* by the trial judge that a remedy must or ought to exist in the state court, or mere *general* statement by counsel to such effect, without precise application, is not sufficient to warrant the District Court in refraining from exercising its jurisdiction.

We turn to *seriatim* consideration of California remedies claimed to be "available" by Appellees in their brief (pp. 12-22).

A. *Suit by State; Defensive Matter Pleaded.*

Appellees first suggest (p. 13) that the County could, as it has done since this suit was filed, bring a suit in which "of course it must prove the tax is valid and due, and the defendant may set up *invalidity* as a defense."

Appellant's claim arises out of an independently created "credit" or offset. As previously demonstrated, it could not set up the same by answer; it would have to be pleaded as a "counterclaim". This would constitute an *unauthorized* suit against the State.

This Court, in *Sunset Oil Co. v. State of California,* 87 F. 2d 972, well summarized the California cases, and in that case, held that consent to suit had *not* been granted by the State, even as to a valid statutory offset which, should have been (but was not) administratively employed.

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[5]See discussion of factual situation as to remedy under New Jersey law before the Supreme Court in the *Hillsborough Case,* discussed in Appellant's Op. Br. pp. 31-32.

Appellees are careful not to discuss this Court's prior decision, largely controlling in this case. They content themselves with the suggestion that it is only "secondary authority". They cite no California case contrary thereto, either prior in date or subsequent thereto. None exist.[6]

B. *Declaratory Relief.*

It is unquestioned that declaratory relief statute in California, as in the Federal courts, is a remedial not a substantive section. Its jurisdiction only vests as to matters otherwise justiciable in the California courts. Unless, therefore, there is *express* authority somewhere by California statute, specifically, to sue the state and its entities, to establish the Federal offset or "credit" here involved, declaratory relief is not an available remedy.

C. *Cancellation Proceedings.*

Appellees frankly agree with us that cancellation is not an available remedy (p. 16).

D. *Payment Under Protest.*

Appellees' entire argument as to this "remedy" is predicated upon its *erroneous assumption* that the "credit" or offset renders the tax *"void* or *illegal"*. Unless it does so, the section is conceded to be wholly inapplicable.

As pointed out above, the Federal "credit" or offset is *predicated* upon the assumption that it will be applied to a valid tax.

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[6]For California cases to same effect, subsequent to 1937, date of this Court's decision, see:

*County of Los Angeles v. Riley,* 20 Cal. 2d 652 (1942);
*People v. Buellton Dev. Co.,* 58 Cal. App. 2d 178 (1943);
*Bayshore Sanitary Dist. v. San Mateo,* 48 Cal. App. 2d 337 (1941).

E. *Claim and Suit.*

Appellees further contend (p. 19) that since the tax itself may be valid, but its "collection" invalid, Appellant could file its claim under Revenue and Taxation Code Section 5096, *et seq.,* and, if denied, sue for its recovery.

But, the premise of Appellant's case here is that since the tax itself was valid until an *affirmative* duty by *judgment* of the District Court had been placed upon the Appellee Tax Collector, his collection would *not* be *illegal.*

Under California law, he *must* collect the tax in *legal tender* of the United States, or, exceptionally, by use of County warrants, *supra* (p. 3), and *no other means of "payment" are recognized.*

Until Appellee Tax Collector is *relieved* by some legal action of the amount of dollars and cents charged to him by the auditor when he accepted the roll for collection, he is *responsible* under California law for payment of the money to the County Treasurer or to return it as "delinquent" on the "delinquent roll" as unpaid taxes (Rev. and Tax. Code Sec. 2603, *et seq.*).

We know of only *two* ways in which the cloud of Appellee County's tax on Appellant's "possessory interest" and the duty of Appellee Tax Collector to collect the same, can be removed. These are:

1. *Voluntary action* by Appellee Board of Supervisors through cancellation of the tax.

2. By *judgment of this Court,* declaring the offset to defeat the Appellee Tax Collector's "ultimate recovery."

F. *Extraordinary Remedies.*

As to *mandamus, certiorari* and injunction, Appellees expressly concede that such "are not available" (p. 22).

Appellees contend that this result is because the California courts have always held that statutory remedies

are adequate, and therefore these extraordinary remedies should *not* lie.

Granted that such is the case, it has never been held that Federal jurisdiction rests upon a state court determination that its remedy is adequate *if, in fact, it is not.*

Our situation is analogous to that presented to the Supreme Court in *Hillsborough Township v. Cromwell,* 326 U. S. 620 (quoted App. Op. Br. pp. 31-32). New Jersey assessing authorities had discriminated between taxpayers of the *same class* by assessing property of a *single* taxpayer at the *full* statutory rate, but illegally exempted *all other* similar *property.*

The Federal right to *"equal* treatment" under such circumstances had been long established by *Sioux City Bridge Co. v. Dakota County, Nebraska,* 260 U. S. 441, 445-447. New Jersey, of course, recognized *existence* of such Federal right, but had long held that the wronged taxpayer's *only remedy* was to compel *proper* assessment of the privileged or exempted property, not by *reduction* of the tax on the *discriminated* property.

In the *Sioux City Bridge Case,* a similar holding by the Nebraska Court had been held by the Supreme Court to be an *inadequate* remedy. For such reason, the Supreme Court had given *direct* Federal relief, by ordering the wronged taxpayer's "assessment" to be reduced to the same percentage of value at which others were taxed.

In the *Hillsborough Case,* the Township argued that a fairly recent New Jersey decision had indicated state adoption of the Federal remedy. It appeared, however, that subsequently, in another decision written by the same Judge, doubt was thrown on this remedy.

Under such circumstances, the Supreme Court, *disregarding the New Jersey court's view of adequacy,* held the remedy in New Jersey to be "inadequate", and that

there was sufficient "uncertainty" as to the remedy to justify the District Court retaining jurisdiction under 28 U. S. C. 1331, and proceeding to render a declaratory judgment under 28 U. S. C. 2201.

G. *Subsequent State Suit Demonstrates Lack of "Plain" Remedy Open to Appellant.*

The real proof of the pudding here is what actually happened in the subsequent suit brought by San Bernardino County to collect its tax.

This suit alleged nothing as to the Federally determined "credit" or offset. Appellant answered generally, admitting the levy, denying its validity in part only on state grounds (which have been expressly not urged in this proceeding) and improperly set up (Witken, *California Procedure, supra,* p. 8) the Federal "credit" or offset.

It then *properly, under the same authority, by cross-complaint,* alleged *affirmatively* the "credit" exceeded the entire amount of the claimed taxes; alleged the duty of the County officials under such "credit"; *and prayed for declaration of such right and injunction against the County from enforcing any tax less or equal to the amount of such "credit" or offset.*

The United States petitioned to intervene, setting up the "credit" and offset, alleging itself to be the real party in interest, and seeking similar relief.

On motion of Appellee County, the intervention was denied, and Appellant's cross-complaint was stricken *without leave to amend.*

In such subsequent state action, the situation thus stands that the real party of interest, the United States, has not been permitted to intervene; the only proper pleading setting up the Federal "credit" and offset has been stricken and, at best, appellant has been left with a doubtful answer under California procedure.

## IV.

### Federal "Credit" or Offset Has Been Acknowledged and Allowed in Other States.

Although perhaps not necessary to the discussion on this appeal, it may well be of interest to this Court that the questions precipitated herein, by the refusal of San Bernardino County voluntarily to accede to the determination of the Federal "credit" or offset, have not been raised in most states, but the Federal "credit" or offset has been recognized and allowed. For summary of situations elsewhere see appendix.

### Conclusion.

From the foregoing, it is respectfully submitted that there is no question as to the primary Federal jurisdiction herein. The only matter in controversy between the parties is the Federally created "credit" or offset to an otherwise valid state tax, "arising out" of the provisions of Section 408 of the National Housing Act.

Judgment of dismissal below was erroneously rendered, because of the mistaken view of the Trial Judge that this was an action to enjoin the collection of a state tax, which it is not. Therefore, he thought it fell within the purview of 28 U. S. C. 1341 (Johnson Act). His further *assumption* that the matter could be presented by *some* remedy open to Appellant in the state courts, was likewise erroneous since, to bar jurisdiction of the District Court, there must be "certainty" as to the existence of a "plain", "speedy" and "efficient" remedy under state law.

Appellees have not even attempted to point out any *specific* remedy available to Appellant. We have demonstrated that there is none.

The judgment of dismissal by the Trial Court should be reversed, with instructions to the Trial Court to permit Appellees to file such answer or other pleadings as they desire on the merits.

Respectfully submitted,

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## APPENDIX.

### Acknowledgment of Federal "Credit" or Offset in Other States.

On April 9, 1958, thus the Attorney General of Alabama ruled, as to a "Wherry Housing Project" in Calhoun County, that the offset provided by Section 408 of the National Housing Act should be recognized by the Calhoun County authorities. Since the Congressional act was lacking in explicit machinery, he held that its direct application was "an administrative matter" to be worked out between the Secretary of Defense, his designee, the lessee and the local taxing authorities.

On May 27, 1957, the Attorney General of the State of Wyoming rendered his opinion concerning the effect of the Federal "credit" or offset on the 1957 tax at Warren Air Force Base. After pointing out that the local officials had stated that the *maximum* tax which they could impose upon the project would be *about $50,000.00,* and that the *"Federal Contribution* to the area" *amounted* to *$50,000.00 to $60,000.00,* the Attorney General advised *"as a practical matter",* that *"no attempt should be made to tax the Wherry Housing Project."*

In Utah, we are informed that the Davis County Commissioners adjusted their tax to allow for the Federally created "credit" or offset for both tax years 1956 and 1957.

In only one instance in the State of Washington, to our knowledge, has objection judicially been made to the Federal "credit." This arose in connection with a condemnation proceeding brought by the Government to take over two Wherry Projects. In connection therewith, an attempt was made by local authorities to secure payment of their taxes, without allowance for the Fed-

erally created "credit" and offset. The matter came on for hearing before District Judge Driver in the District Court for the Eastern Division of Washington, Northern Division. The Federal "credit" and offset was sustained.

We are informed that an appeal has been taken but not yet perfected to this Court from such ruling by the State taxing authority.

The Department of Justice (Washington) also reports (although we have not seen the records involved) that Jackson County, Kansas, is resisting a Federal "credit" in the State Court, and a dispute as to a similar "credit" exists with a Florida County and a Massachusetts town but the last two have not proceeded to the judicial stage.